SUPREME COURT, U. S.

APR 4 1970

JOHN F. DAVIS, CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 173

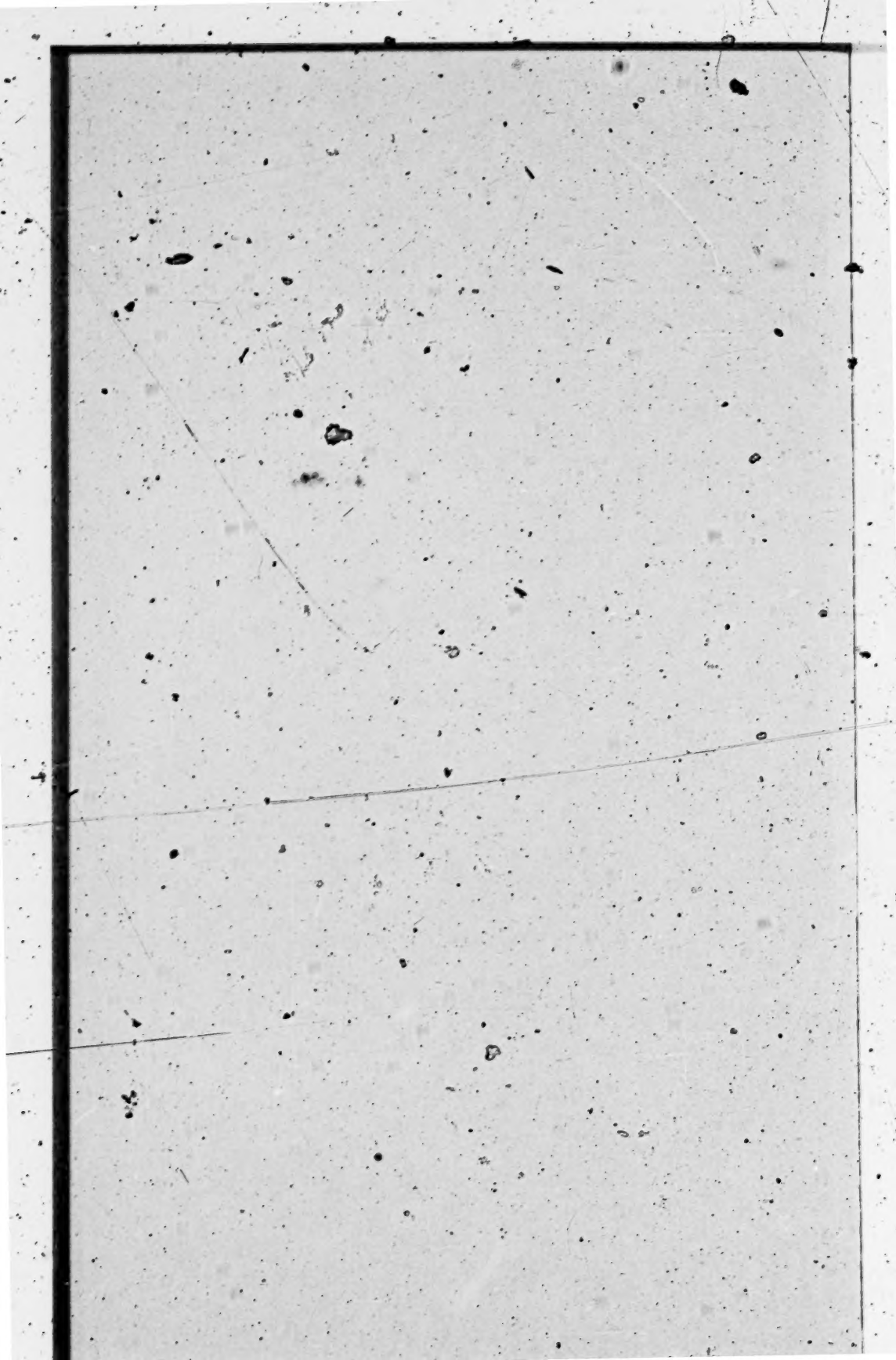
IDA PHILLIPS,
PETITIONER,

—v.—

MARTIN MARIETTA CORPORATION,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 10, 1970
CERTIORARI GRANTED MARCH 2, 1970



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Complaint

(Filed Dec. 12, 1967)

I

Jurisdiction of this Court is invoked pursuant to 28 U. S. C. Section 1343(4) and 42 U. S. C. Section 2000e-5(f). This is a suit in equity authorized and instituted pursuant to Title VII of the Act of Congress known as "The Civil Rights Act of 1964," 42 U. S. C. Sections 2000e et seq. Jurisdiction of this Court is invoked to secure the protection of and redress the deprivation of rights secured by 42 U. S. C. Sections 2000e et seq., providing for injunctive and other relief against discrimination on the ground of sex in employment.

II

Plaintiff brings this action pursuant to Rule 23(b) (2) of the Federal Rules of Civil Procedure, on her behalf and on behalf of other persons similarly situated who have been denied or been dismissed from employment by the Martin Company at its plant and/or other facilities located in the State of Florida, and in and around the City of Orlando. There are common questions of law and fact affecting the rights of other female citizens in this class who are and have been limited, classified and discriminated against in ways which deprive and tend to deprive them of equal employment opportunities and otherwise affect their status as employees because of sex. These persons are so numerous as to make it impracticable to bring them all before this Court. A common relief is sought. The interests of said class are adequately represented by the plaintiff.

III

This is a proceeding for a preliminary and permanent injunction restraining defendant from maintaining a policy, practice, custom or usage of discriminating against the plaintiff, and other female persons with pre-school age children similarly situated, because of sex with respect to compensation terms, conditions and privileges of employment and ways which deprive the plaintiff and other female persons with pre-school age children of equal employment opportunities and otherwise adversely affect their status as employees because of sex.

IV

Plaintiff, Ida Phillips, is a citizen of the United States of America and she presently resides in the City of Jacksonville in the State of Florida.

V

Defendant, Martin Company is a corporation doing business in Orlando, Florida in pursuance of authority granted it by the State of Florida. It has a parent office at San Lake Road, Orlando, Florida. The defendant is an employer within Title VII of the Civil Rights Act of 1964, 42 U. S. C. Section 2000e-(b), in that it is engaged in an industry affecting commerce and employs more than one hundred (100) persons.

VI

The plaintiff applied for employment with the defendant on September 6, 1966 with no success. Plaintiff submitted her application pursuant to an ad in the local newspaper advertising positions for 100 assembly trainees.

The only qualification specified was a "high school background". Plaintiff answered the advertisement by going to the defendants office on September 6, 1966 and filling out an application. When she gave her application to the receptionist, she was told that defendant was not considering applications from women with pre-school age children. Defendant refused to employ plaintiff solely on account of her sex.

VII

The plaintiff originally filed a charge in October 5, 1966 with the Equal Employment Opportunity Commission in Washington, D. C. The charge alleged a violation by the defendant of plaintiff's rights under Title VII of the Civil Rights Act of 1964, 42 U. S. C. Sections 2000e et seq. Attached is a copy of said charge hereto as Exhibit "A". The charge was referred to the Atlanta Regional Office of the Equal Employment Opportunity Commission on or about September 25, 1967. On July 28, 1967 the Equal Employment Opportunity Commission, Washington, D. C. found probable cause to credit the allegation of plaintiff. The Equal Employment Opportunity Commission on July 14, 1967 found reasonable cause to believe that the defendant had violated Title VII of the Civil Rights Act of 1964 by its refusal to consider a woman with pre-school age children for employment. Attached hereto as Exhibit "B" is a copy of the decision of the commission. The commission notified the plaintiff by letter under date of November 9, 1967 that the commission had not achieved voluntary compliance by defendant through conciliation as provided by Title VII of the Civil Rights Act of 1964 and that plaintiff was entitled to initiate a civil action in a United States District Court, as provided by Section 2000e-5(f) of the

Civil Rights Act of 1964. Attached hereto as Exhibit "C" is a copy of this letter.

VIII

Plaintiff and the class she represents have no plain, adequate or complete remedy at law to redress the wrongs alleged herein and this suit for a preliminary and permanent injunction is their only means of securing adequate relief. Plaintiff and the class she represents are now suffering and will continue to suffer irreparable injury because of defendants policy, practice, customs and usage as set forth herein.

WHEREFORE, the plaintiff respectfully prays this Court advance this case on the docket, order a speedy hearing at the earliest practicable date, cause this case to be in every way expedited and upon such hearing to:

1. Grant plaintiff and the class she represents a preliminary and permanent injunction enjoining the defendant, Martin Company, Orlando, Florida, its agents, successors, employees, attorneys and those acting in concert with it and at its direction from continuing or maintaining any policy, practice, custom and usages of denying, abridging, withholding, conditioning, limiting or otherwise interfering with the rights of the plaintiff and others similarly situated to enjoy equal employment, treatment, advancement or training for advancement as secured by Title VII of "The Civil Rights Act of 1964," 42 U. S. C. Sections 2000e et seq.

2. Require defendant to employ plaintiff retroactive to the time of defendants wrongful refusal to employ her, with back pay to said time.

3. Allow plaintiff her costs herein, including reasonable attorney's fees and other additional relief as may appear to this Court to be equitable and just.

/s/ IDA PHILLIPS
Plaintiff

JOHNSON & MARSHALL
by /s/ REESE MARSHALL
Attorney for Plaintiff
625 West Union Street
Jacksonville, Florida 32202

Sworn to and subscribed before me
this 12th day of December, 1967.

/s/ EDWINA L. WAY
Notary Public
My Commission Expires;

Exhibit "A" Annexed to Complaint

(Letter Dated July 28, 1967)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20506

[EMBLEM]

JUL 28 1967

IN REPLY REFER TO:
Case No. 6-9-7758
Martin Company
Orlando, Florida

Mrs. Ida Joane Phillips
5301 Indian Hill Road
Orlando, Florida 32808

Dear Mrs. Phillips:

The Commission has investigated your charge of employment discrimination and has found reasonable cause to believe that an unlawful employment practice with the meaning of Title VII of the Civil Rights Act of 1964 has been committed. The Commission will attempt to eliminate this practice by conciliation as provided in Title VII. You will be kept informed of the progress of conciliation efforts.

Sincerely yours,

/s/ ERIC W. SPRINGER
Eric W. Springer
Director of Compliance

Exhibit "B" Annexed to Complaint

(Decision of Commission)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20506

[EMBLEM]

Mrs. Ida Phillips
Charging Party

Case No. 6-9-7758
AT 6-10-811

vs.

Martin Company
Orlando, Florida
Respondent

Date of alleged violation: September 6, 1966
Date of filing: October 5, 1966
Date of service of charge: January 10, 1967

DECISION

Summary of Charge

Charging Party alleges that she was discriminated against on the basis of her sex (female) as follows:

> When she applied for a job with Respondent in response to a newspaper advertisement, the receptionist told her that her application could not be considered because Respondent was not hiring people with preschool age children.

Summary of Investigation

Respondent is engaged in an industry affecting commerce and is within the jurisdiction of the Commission. Respondent's primary business is aerospace research and manu-

facturing. With its more than 9000 employees, Respondent is the largest employer in the Orlando, Florida area.

In September, 1966, Respondent placed a notice in the local paper advertising openings for 100 assembly trainees. The only qualification specified was a "high school background." Charging Party answered the advertisement by going to Respondent's offices on September 6, 1966, and filling out an application. When she gave her application to the receptionist, she was told that Respondent was not considering applications from people with pre-school age children.

At the time of the investigation, Respondent contended that Charging Party was not qualified for the position advertised since she had no relevant work experience. Charging Party's work experience was not, however, the reason originally given (one line illegible)
work experience was not, however, the reason originally given for failure to consider her application. The evidence indicates that it was because of her young children that she was prevented from being considered.

Respondent stated that its position on applicants with pre-school age children does not constitute a formal rule. However, Respondent admitted that it prefers not to hire women who have young children. This policy is based on Respondent's "past experience" with mothers of small children who, Respondent asserts, have inflexible schedules and often lose time from work caring for their children. No evidence was submitted to support these contentions.

The investigation did disclose that the determinant reason for rejecting Charging Party's application was the fact that she had a pre-school age child. The Commission found in a case with similar facts[1] that it is an unlawful practice to refuse to employ female applicants merely because

Exhibit "B" Annexed to Complaint

they are mothers of pre-school age children. Respondent's action in excluding women with young children from consideration from employment, solely because of Respondent's past experience, is therefore a violation of Title VII.

Decision

Reasonable cause exists to believe that Respondent violated Title VII of the Civil Rights Act of 1964 by its refusal to consider a woman with pre-school age children for employment.

For the Commission

(signed Marie D. Wilson).
Marie D. Wilson, Secretary

JUL 14 1967

Date

Exhibit "C" Annexed to Complaint

(Notice of Right to Sue)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Washington, D.C. 20506

[EMBLEM]

CERTIFIED MAIL RETURN
RECEIPT REQUESTED

NOTICE OF RIGHT TO SUE
WITHIN 30 DAYS

NOV 9 1967

In Reply Refer To:
Case No. 6-9-7758 (AT 6-10-811)
Martin Company
Orlando, Florida

Mrs. Ida Phillips
1445 Domas Drive
Jacksonville, Florida 32211

Dear Mrs. Phillips:

This is to advise you that conciliation efforts in the above matter have failed to achieve voluntary compliance with Title VII of the Civil Rights Act of 1964. Pursuant to Section 706(e) of the Act, you are hereby notified that you may, within thirty (30) days of the receipt of letter, institute a civil action in the appropriate Federal District Court. If you are unable to retain an attorney, the Federal Court is authorized in its discretion, to appoint an attorney to represent you and to authorize the commencement of the suit without payment of fees, costs or security. If you decide to institute suit and find you need such assistance,

Exhibit "C" Annexed to Complaint

you may take this letter, along with the Commission determination of reasonable cause to believe Title VII has been violated, to the Clerk of the Federal District Court nearest to the place where the alleged discrimination occurred, and request that a Federal District Judge appoint counsel to represent you.

Please feel free to contact the Commission if you have any questions about this matter.

Sincerely,

/s/ ROBERT L. RANDOLPH
Robert L. Randolph (Acting)
Director of Compliance

Motion to Dismiss, Motion to Strike, and Request for Oral Argument

(Filed Jan. 10, 1968)

Motion To Dismiss

Comes now the defendant, MARTIN MARIETTA CORPORATION, and moves the court to dismiss the complaint, and for grounds states:

1. The complaint was not filed within the time provided by law.

2. The complaint does not state a class action against the defendant.

3. The complaint fails to state a claim upon which relief can be granted.

Motion To Strike

Defendant moves to strike the following from the complaint:

1. The words "national origin" from paragraph I.

Request For Oral Argument

Pursuant to 7(c) of the General Rules, defendant requests this motion be set down for oral argument.

/s/ J. THOMAS CARDWELL
J. Thomas Cardwell, of
AKERMAN, SENTERFITT, EIDSON, MESMER, ROBBINSON & WHARTON
506 First National Bank Building
P.O. Box 231
Orlando, Florida 32802

Attorneys for Defendant

Order

(Filed Feb. 27, 1968)

This cause came on pursuant to due notice on the application of the plaintiff for a temporary injunction and the motions of the defendant to dismiss the complaint and to strike certain portions thereof. After considering the complaint, the motions of the defendant and the memorandum filed in support of said motions and the plaintiff not offering any evidence in support of her application for temporary injunction, it is,

ORDERED that the motion to dismiss the complaint be and is hereby denied and the defendant is granted ten (10) days from date hereof within which to file an answer to the complaint as it stands after the ruling hereinafter set forth on the motion to strike; it is further,

ORDERED that those portions of the complaint concerning the alleged denial of a right based upon the claim that the plaintiff was discriminated against because she has pre-school age children, be and are hereby stricken, it being the holding of this Court that discrimination based upon an applicant having pre-school age children is not a discrimination based upon sex in violation of the Civil Rights Act. However, the allegation alleging a violation of the Civil Rights Act based solely on discrimination because of sex remains unstricken; it is further

ORDERED that the portions of the complaint alleging the action to be a class action are stricken and this case shall proceed with the plaintiff suing solely in her individual capacity; and it is further,

ORDERED that the application for temporary injunction be and is hereby denied, there being no evidence offered in

support thereof, but because it is alleged that this case comes under the Civil Rights Act, the proceedings will be expedited and it is for that reason that only ten (10) days are granted for the filing of the answer, rather than the usual twenty (20) days.

DONE and ORDERED in Chambers at Orlando, Florida, this 26th day of February, 1968.

/s/ GEORGE C. YOUNG
United States District Judge

Answer

(Filed March 8, 1968)

Comes now MARTIN MARIETTA CORPORATION, by and through its undersigned attorneys, and answers the Complaint as follows:

1. Referring to Paragraph I of the Complaint, defendant admits Paragraph I except that it denies that this action is brought to redress discrimination on the basis of national origin.

2. Paragraph II of the Complaint was struck by the Court's Order of February 26, 1968.

3. Referring to Paragraph III of the Complaint, defendant admits this is an action for an injunction but denies each and every allegation of discrimination on the basis of sex contained therein.

4. Referring to Paragraph IV of the Complaint, defendant is without knowledge of the allegations contained therein.

5. Referring to Paragraph V of the Complaint, defendant denies that its corporate name is "Martin Company", but rather alleges that it is the Martin Marietta Corporation, and denies that it has a parent office in Orlando, Florida. The other allegations of Paragraph V are admitted.

6. Referring to Paragraph VI of the Complaint, defendant admits that plaintiff applied without success for employment with the defendant on September 6, 1966; that the newspaper advertisement specified high school background was required; and that the receptionist told plaintiff applications from women with pre-school age

children were not being considered. Defendant denies that plaintiff was refused employment solely on the basis of her sex. Defendant is without knowledge of the other allegations of this paragraph.

7. Referring to Paragraph VII of the Complaint, defendant admits that plaintiff filed a charge with the Equal Employment Opportunity Commission on October 5, 1966, alleging defendant had violated Title VII of the Civil Rights Act of 1964; that on July 14, 1967 the Equal Employment Opportunity Commission found reasonable cause to believe defendant had violated said act and that by letter dated November 9, 1967 plaintiff was notified conciliation efforts had failed. Defendant is without knowledge of any referral of the said charge to the Atlanta Regional Office of the Equal Employment Opportunity Commission. Defendant denies the allegations contained in this paragraph and in the documents referred to therein as they relate to discrimination on the basis of sex.

8. Referring to Paragraph VIII of the Complaint, defendant denies the allegations contained therein as they relate to the plaintiff individually. Those portions relating to a class action were struck by the Court's Order of February 26, 1968.

Affirmative Defense

By way of further defense, defendant alleges that this action is barred in that this suit was not timely filed pursuant to 28 U.S.C.A. § 2000e-5(e).

Motion for Summary Judgment

(Filed May 31, 1968)

Defendant, MARTIN MARIETTA CORPORATION, moves this Court for entry of summary judgment in its favor against the plaintiff, IDA PHILLIPS, and as grounds therefor states that the pleadings, interrogatories and affidavit on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Request for Oral Argument

Pursuant to Rule 7(C) of the Local Rules, defendant requests oral argument on the above motion.

Affidavit of Donald C. Parsons

STATE OF FLORIDA
COUNTY OF ORANGE

Before me, the undersigned authority, on this day personally appeared DONALD C. PARSONS, who, being first duly sworn, deposes and says:

1. My name is Donald C. Parsons and I am employed by the Martin Marietta Corporation at Orlando, Florida.

2. I am Manager of the Employment Department and have held such position for over two years.

3. In my capacity as Manager of the Employment Department I am personally responsible for, and in charge of, the hiring of all personnel.

4. In my capacity as Manager of the Employment Department I was cognizant of the terms of Title VII of the Civil Rights Act of 1964, including its prohibition against the discrimination in employment based on sex, and at all times I followed the Company policy of compliance with that Statute.

5. I was personally in charge of the hiring of assembly trainees during the relevant period.

6. Approximately 75 to 80% of all those hired as assembly trainees during the relevant period were women.

7. Approximately 70 to 75% of all the job applicants for assembly trainees were women.

8. I was personally at the Martin Marietta Corporation's Orlando facility, supervising the hiring of assembly trainees at the time Mrs. Phillips sought employment.

Affidavit of Donald C. Parsons

9. At the time that Mrs. Phillips sought employment no one was discriminated against because of sex and the fact that she was not offered employment was in no respect based on her sex.

Further affiant sayeth not.

/s/ DONALD C. PARSONS
Donald C. Parsons

Sworn to and subscribed
before me this 30th day
of May, 1968.

SHIRLEY R. MCGILL
Notary Public
My Commission expires: Nov. 3, 1971

SEAL

Request for Admission

(Filed June 26, 1968)

Comes Now the plaintiff, Ida Phillips, and pursuant to Rule 36 of the Rules of Civil Procedure, requests the defendant within ten (10) days after service of this request to make the following admission for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That the Martin Marietta Corporation now employs males with pre-school age children in the position of Assembly Trainees?

Ruling on Motion for Summary Judgment

(Filed July 9, 1968)

This cause came on before the Court for hearing July 8, 1968, on the motion of the defendant, MARTIN MARIETTA CORPORATION, for summary judgment. The complaint as originally filed alleged that the plaintiff was discriminated against because of an alleged policy of the defendant not to hire women with pre-school age children. In an order entered February 26, 1968, this Court ruled that the discrimination raised by that allegation was not the sort of discrimination prohibited by Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. 2000(e) et seq., and that the allegation raising discrimination based on the fact that the plaintiff had pre-school children should be stricken. The case proceeded on the basis of alleged discrimination based on the plaintiff's sex alone.

In support of its motion for summary judgment, the defendant has filed affidavits and answers to interrogatories showing that the defendant has hired 479 women for the same job for which the plaintiff sought to apply during the relevant period of time; that 70-75% of the applicants for that position were women; that 75-80% of the employees holding that position were women, and that there is no basis in this record to support a finding that the defendant discriminated against this plaintiff because she is a woman.

The plaintiff maintains that a response to a request for admission filed herein June 26, 1968, would be sufficient to withstand defendant's motion for summary judgment. That request seeks an admission from the defendant "(t)hat the Martin Marietta Corporation now employs males with pre-school age children in the position of Assembly Trainees?" Although the time for objecting or responding to that request for admission has not expired at this time, the

Court, for purposes of the motion for summary judgment accepts that request for admission as admitted, and finds that the defendant does employ males with pre-school age children in the position of Assembly Trainee. It is, however, the opinion of the Court that such fact is irrelevant and immaterial to the issue before the Court. The responsibilities of men and women with small children are not the same, and employers are entitled to recognize these different responsibilities in establishing hiring policies.

The plaintiff having submitted no affidavits tending to show that the defendant discriminated against the plaintiff because the plaintiff is a woman, it is the opinion of the Court that there is no genuine dispute of material fact and that the defendant is entitled to summary judgment as a matter of law. It is, therefore,

ORDERED and ADJUDGED that the motion of the defendant, Martin Marietta Corporation, for summary judgment be and is hereby granted; judgment in accordance with this opinion will be entered separately.

DONE and ORDERED in Chambers at Orlando, Florida, this 8th day of July, 1968.

/s/ GEORGE C. YOUNG
United States District Judge

Judgment

(Filed July 9, 1968)

This cause having been duly heard on defendant's motion for summary judgment and the Court having ruled that the defendant is entitled to summary judgment, it is in accordance therewith,

ORDERED and ADJUDGED that the plaintiff take nothing; that the action be dismissed on the merits, each party to bear its own costs.

DONE and ORDERED in Chambers at Orlando, Florida, this 8th day of July, 1968.

/s/ GEORGE C. YOUNG
United States District Judge

Motion for Leave to Proceed in Forma Pauperis

(Filed July 31, 1968)

Plaintiff moves this Court for an order granting leave to appeal from the Judgments entered on February 26, 1968 and July 8, 1968 without prepayment of costs and fees and without giving security therefor. The grounds of this Motion are as follows:

The plaintiff is a citizen of the United States residing at Jacksonville, Duval County, Florida, and is without property or money with which to pay the costs of appeal and is unable to pay costs or fees on appeal or the expense of furnishing a stenographic transcript as more fully appears from plaintiff's Affidavit attached hereto.

Affidavit to Accompany Motion for Leave to Appeal in Forma Pauperis

STATE OF FLORIDA,
COUNTY OF DUVAL, *ss.*:

I, IDA PHILLIPS, being first duly sworn, depose and say, that I am the plaintiff in the above entitled case; that in support of my Motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceedings or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are as follows:

1. The District Court erred in striking those portions of plaintiff's complaint concerning the alleged denial of a right based upon a claim that plaintiff was discriminated against because she had pre-school age children.

2. That the District Court erred in striking those portions of the plaintiff's complaint alleging the action to be a class action.

3. The District Court erred in granting Summary Judgment for the defendants.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? Yes

(a) Amount of salary per month and name and address of employer. $120.00—Derby House, 5940 Merrill Road, Jacksonville, Florida.

2. Have you received within the past 12 months any income from business, profession or other form of self-

employment. Or in form of rent payment, interest, dividens or other source? No

3. Do you own any cash or checking or savings account? No

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property? Real Property—Buying Home, $12,000.00

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Grace McAllister	5 years	Daughter
Reggie McAllister	17 years	Son
Ronnie McAllister	15 years	Son
Vera McAllister	14 years	Daughter
Alfred McAllister	13 years	Son
Bryan McAllister	11 years	Son
Kenneth McAllister	9 years	Son

I understand that a false statement or answer to any questions in this Affidavit will subject me to penalties for perjury.

/s/ Ida Phillips
Ida Phillips—Affiant

Sworn to and Subscribed before me
this 29th day of July, A. D. 1968.

/s/ Edwina L. Way
Notary Public
My Commission Expires:

Order

(Filed Aug. 13, 1968)

This cause came on before the Court for hearing August 12, 1968, on the motion of the plaintiff for leave to appeal in forma pauperis. Having considered plaintiff's affidavit and having heard plaintiff's testimony, it is,

ORDERED that the motion of the plaintiff for leave to appeal in forma pauperis be and is hereby granted, provided, however, that should the defendant prevail upon the final disposition of this action, the plaintiff shall reimburse the United States of America for the costs of her appeal upon terms and conditions to be determined at the appropriate time.

DONE and ORDERED in Chambers at Orlando, Florida, this 13th day of August, 1968.

/s/ GEORGE C. YOUNG
United States District Judge

Notice of Appeal

(Filed Aug. 12, 1968)

Notice is hereby given that Ida Phillips, plaintiff above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Final Judgments entered in this action on February 26, 1968 and July 8, 1968 whereby:

(1) The District Court erred in striking those portions of plaintiff's complaint concerning the alleged denial of a right based upon a claim that plaintiff was discriminated against because she has pre-school age children.

(2) That the District Court erred in striking those portions of the plaintiff's complaint alleging the action to be a class action.

(3) The District Court erred in granting Summary Judgment for the defendants.

Opinion by Court of Appeals for the Fifth Circuit, May 26, 1969

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26825

IDA PHILLIPS,
Plaintiff-Appellant,

versus

MARTIN MARIETTA CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

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(May 26, 1969)

Before GEWIN, McGOWAN* and MORGAN, Circuit Judges.

MORGAN, Circuit Judge: The present action is before us on an appeal from the granting of a motion for summary judgment by the District Court. The original complaint under Section 706 (e) of the Civil Rights Act of 1964, 42 U.S.C. § 2000-5 (e), alleged that appellee Martin Marietta Corporation had violated Section 703,

---

*Judge Carl McGowan of the District of Columbia Circuit, sitting by designation.

42 U.S.C. § 2000e-2 when it wrongfully denied appellant Phillips employment because of sex. An ancillary issue raised concerns the propriety of the District Court's allowing the appeal in forma pauperis conditioned on appellant Phillips' reimbursing the United States in the event of an unsuccessful appeal.

Ida Phillips, the appellant, submitted an application for employment with the appellee, Martin Marietta Corporation, for the position of Assembly Trainee pursuant to an advertisement in a local newspaper. When Mrs. Phillips submitted her application in an effort to gain employment, an employee of Martin Marietta Corporation indicated that female applicants with "pre-school age children" were not being considered for employment in the position of Assembly Trainee. However, males with "pre-school age children" were being considered. A charge was thereafter filed with the Equal Employment Opportunity Commission alleging that plaintiff-appellant's rights under Title VII of the Civil Rights Act of 1964[1] had been violated. The Commission found reasonable cause to believe that defendant Martin Marietta Corporation had discriminated on the basis of sex, and plaintiff filed a class suit in the District Court.

The District Court granted a motion to strike that portion of the complaint which alleged that discrimination against women with pre-school age children violated the statute, and it refused to permit the case to proceed as a class action. The complaint was not

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[1] 42 U.S.C. § 2000e, et seq.

dismissed, however, and it was left open to plaintiff to submit evidence to prove her general allegation that she had been discriminated against because of her sex.

Defendant then moved for summary judgment, supported by an uncontroverted showing that, while 70 to 75 percent of those who applied for this position were women, 75 to 80 percent of those holding the positions were women. Defendant claimed that this established that there was no discrimination against women in general, or against plaintiff in particular. The Court granted the motion on the ground that there were no material issues of fact which would support a conclusion of discrimination on the basis of sex.

The primal issue presented for consideration is whether the refusal to employ women with pre-school age children is an apparent violation of the 1964 Civil Rights Act's proscription of discrimination based on "sex". The pertinent portion of the Act, 42 U.S.C. 2000e-2, reads as follows:

> (a) It shall be unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex or national origin;

The defendants do not choose to rely on the "bona fide occupational qualification" section of the Act,[2] but, instead, defend on the premise that their established standard of not hiring women with pre-school age children is not per se discrimination on the basis of "sex".

The question that confronts us is a novel one upon which the courts have been asked to rule only on a

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[2] 42 U.S.C. § 2000e-2(e):

Unlawful employment practices — Employer practices. Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion.

(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

few occasions. However, none of the cases reviewed by this Court deal with the specific issue presented here. In the case of *Cooper v. Delta Airlines, Inc.*, 274 F. Supp. 781 (E.D. La., 1967), appeal dismissed, No. 25,698, 5 Cir., Sept. 1968 the District Court held that an airlines hostess who is fired because she was married has not been discriminated against on the basis of sex. However, Delta did not consider men for the positions in question, and therefore, unlike the case *sub judice*, the discrimination was between different categories of the same sex. Recently the Fifth Circuit was called upon to review a problem of a kindred nature in *Weeks v. Southern Bell Telephone & Telegraph Co.*, No. 25,725 (5 Cir., Mar. 4, 1969). However, that case is inapposite to the case at bar in that the defendant in *Weeks*, supra, established its defense on the "bona fide occupational qualification", rather than relying solely on 42 U.S.C. 2000e-2a (1).

The position taken by the Equal Employment Opportunity Commission is that where an otherwise valid criterion is applied solely to one sex, then it automatically becomes a per se violation of the Act. In its argument, the defendant outlines the proposal that before a criterion which is not forbidden can be said to violate the Act, the court must be presented some evidence on which it can make a determination that women as a group were treated unfavorably, or that the applicant herself was singled out because she was a woman. However, neither litigant is able to present substantive support for its theory. Both cite selected sections from the congressional history of the bill; however, a perusal of the record in Congress will reveal that the

word "sex" was added to the bill only at the last moment and no helpful discussion is present from which to glean the intent of Congress. To buttress its position, the Commission cites to its own regulations; however, it is well established administrative law that the construction put on a statute by an agency charged with administering it is entitled to deference by the courts, but the courts are the final authorities on issues of statutory construction. *Volkswagenwerk v. FMC*, 390 U.S. 261 (1968).

We are of the opinion that the words of the statute are the best source from which to derive the proper construction. The statute proscribes discrimination based on an individual's race, color, religion, sex, or national origin. A per se violation of the Act can only be discrimination based solely on one of the categories i.e. in the case of sex; women vis-a-vis men. When another criterion of employment is added to one of the classifications listed in the Act, there is no longer apparent discrimination based solely on race, color, religion, sex, or national origin. It becomes the function of the courts to study the conditioning of employment on one of the elements outlined in the statute coupled with the additional requirement, and to determine if any individual or group is being denied work due to his race, color, religion, sex or national origin. As was acknowledged in *Cooper*, supra, 42 U.S.C. 2000e-2 (a) does not prohibit discrimination on any classification except those named within the Act itself.[3] Therefore,

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[3] "The discrimination lies in the fact that the plaintiff is married — and the law does not prevent discrimination against married people in favor of the single ones." *Cooper* v. *Delta Air Lines, Inc.*, 274 F. Supp. 781 (1967).

once the employer has proved that he does not discriminate against the protected groups, he is free thereafter to operate his business as he determines, hiring and dismissing other groups for any reason he desires. However, it is the duty of the employer to produce information to substantiate his defense of non-discrimination. It is emphasized that this issue does not concern the bona fide occupational qualification under which discrimination is admitted by the employer while alleging that such discrimination was justified.

As to the case *sub judice*, as assembly trainee, among other disqualifications, cannot be a woman with pre-school age children. The evidence presented in the trial court is quite convincing that no discrimination against women as a whole or the appellant individually was practiced by Martin Marietta. The discrimination was based on a two-pronged qualification, i.e., a woman with pre-school age children. Ida Phillips was not refused employment because she was a woman nor because she had pre-school age children. It is the coalescence of these two elements that denied her the position she desired. In view of the above, we are convinced that the judgment of the District Court was proper, and we therefore affirm.

Decision in this case ultimately turns, of course, upon the reach of the Congressional intention underlying the statutory prohibition of discrimination in employment based upon sex. Where an employer, as here, differentiates between men with pre-school age children, on the one hand, and women with pre-school

age children, on the other, there is arguably an apparent discrimination founded upon sex. It is possible that the Congressional scheme for the handling of a situation of this kind was to give the employer an opportunity to justify this seeming difference in treatment under the "bona fide employment disqualification" provision of the statute.

The Commission, however, in its appearance before us has rejected this possible reading of the statute. It has left us, if the prohibition is to be given any effect at all in this instance, only with the alternative of a Congressional intent to exclude absolutely any consideration of the differences between the normal relationships of working fathers and working mothers to their pre-school age children, and to require that an employer treat the two exactly alike in the administration of its general hiring policies. If this is the only permissible view of Congressional intention available to us, as distinct from concluding that the seeming discrimination here involved was not founded upon "sex" as Congress intended that term to be understood, we have no hesitation in choosing the latter. The common experience of Congressmen is surely not so far removed from that of mankind in general as to warrant our attributing to them such an irrational purpose in the formulation of this statute.

In conclusion, we address ourselves to the condition attached to the *in forma pauperis* grant. Once the District Court has determined that the application to proceed in forma pauperis is meritorious, the discretion of the Court is closed and the application should be

granted. Title 28, U.S.C.A. 1915; *Williford v. People of State of California*, 329 F. 2d 47 (9 Cir., 1964). The condition that appellant Phillips must reimburse the United States in the event of an unsuccessful appeal is hereby removed from the grant to proceed in forma pauperis.

AFFIRMED.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1968

No. 26825

D. C. Docket No. Civ. 67-290-Orl

IDA PHILLIPS,

Plaintiff-Appellant,

versus

MARTIN MARIETTA CORPORATION,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

Before:

GEWIN, McGOWAN* and MORGAN,

Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

May 26, 1969

Issued as Mandate: JUN 17 1969
Re-Issued as Mandate: DEC 11 1969

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* Judge Carl McGowan of the District of Columbia Circuit, sitting by designation.

Letter Recalling Mandate

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

EDWARD W. WADSWORTH
CLERK

ROOM 408-400 ROYAL ST.
NEW ORLEANS, LA. 70130

July 29, 1969

To COUNSEL LISTED BELOW

No. 26825—*Ida Phillips* v. *Martin Marietta Corp.*

Gentlemen:

The Court has directed that I send this letter to counsel.

Pending further order of the Court, the mandate heretofore issued is being recalled.

At the request of one of the members of the Court in active service, the parties are requested to file and exchange further briefs that they consider appropriate or necessary with respect to the issues decided in the Court's opinion of May 26, 1969, with particular reference to the standard to be applied under the statute forbidding discrimination because of sex.

Letter Recalling Mandate

These briefs should be filed within twenty (20) days from this date and may be filed in typewritten form in 15 copies.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk.

By GILBERT F. GANUCHEAU
Gilbert F. Ganucheau
Chief Deputy Clerk

GFG:adg

Mr. Reese Marshall
Messrs. David R. Cashdan
Philip B. Sklover
Messrs. J. Thomas Cardwell
George T. Eidson, Jr.

cc-Mr. Wesley R. Thies, *Clerk*

Order by Court of Appeals for Fifth Circuit Denying Petition for Rehearing, October 13, 1969

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26825

IDA PHILLIPS,
Plaintiff-Appellant,

versus

MARTIN MARIETTA CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

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(October 13, 1969)

Before GEWIN, McGOWAN* and MORGAN, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35 Federal Rules

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*From the D.C. Circuit, sitting by designation.

of Appellate Procedure; Local Fifth Circuit Rule 12); Rehearing En Banc is also DENIED.

Before BROWN, Chief Judge, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, and CARSWELL, Circuit Judges.

BROWN, Chief Judge, with whom AINSWORTH and SIMPSON, Circuit Judges, join, dissenting:

I dissent from the Court's failure to grant rehearing en banc. [1]

I.

Without regard to the intrinsic question of the correctness of the Court's decision and opinion, this is one of those cases within the spirit of FRAP 35 and 28 USCA §46 which deserves consideration by the full Court.

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[1] Presumably because it was *amicus* only and not a party, the Government did not seek either rehearing or rehearing en banc. For understandable reasons the private plaintiff, Ida Phillips, who has the awesome role of private Attorney General without benefit of portfolio, or more important, an adequate purse, presumably felt that she had fulfilled her duty when the Court ruled. Subsequently, on a poll being requested, FRAP 35; 5th Circuit Rule 12, the Government filed a strong brief attacking the Court's decision. Likewise, the private plaintiff's counsel filed a persuasive brief. This merely emphasizes that it has been members of this Court, not the parties, who have raised questions about the Court's decision. This is in keeping with 28 USCA §46 and FRAP 35.

Order by Court of Appeals for Fifth Circuit Denying Petition for Rehearing, October 13, 1969

As the records of this Court reflect, we have within the very recent months had to deal extensively with Title VII civil rights cases concerning discrimination in employment on account of race, color, sex and religion.[2] Court decisions on critical standards are of unusual importance. This is so because, except for preliminary administrative efforts at conciliation and the rare pattern or practice suit by the United States,[3] effectuation of Congressional policies is largely committed to the hands of individual workers who take on the mantle of a private attorney general[4] to vindicate, not individual, but public rights.

This makes our role crucial. Within the proper limits of the case-and-controversy approach we should lay down standards not only for Trial Courts, but hopefully also for the guidance of administrative agents in the

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[2]These include the following and those cited therein: Jenkins v. United States Gas Corp., 5 Cir., 1968, 400 F.2d 28; Oatis v. Crown Zellerbach Corp., 5 Cir., 1968, 398 F.2d 496; Pettway v. American Cast Iron Pipe Co., 5 Cir., 1969, 411 F.2d 998; Local 189, United Papermakers and Paperworkers, 5 Cir., 1969, ——— F.2d ——— [No. 25956, July 28, 1969]; United States v. Hayes Internat'l. Corp., 5 Cir., 1969, ——— F.2d ——— [No. 26809, August 19, 1969]; Weeks v. Southern Bell Tel. & Tel. Co., 5 Cir., 1969, 408 F.2d 228; Dent v. St. Louis-S.F. Ry., 5 Cir., 1969, 406 F.2d 399.

Also pending before a panel of this Court are two analogous cases under §17 of the Fair Labor Standards Act, 29 USCA §§201 *et seq.*, involving equality of compensation to women: No. 26960, Schultz v. First Victoria Nat'l. Bank; and No. 26971, Shultz v. American Bank of Commerce.

[3]See §707(a), 42 USCA §2000e-6 (a).

[4]See Pettway v. American Cast Iron Pipe Co., note 2, *supra*, 411 F.2d at 1005; Jenkins v. United Gas Corp., note 2, *supra*, 400 F.2d at 32-33.

field, as well as employers, employees, and their representatives.

The full Court should look at the issue here posed. And now in the light of the standard erected — sex if coupled with another factor is acceptable — it is imperative that the full Court look at it.

II.

Equally important, the full Court should look to correct what, in my view, is a palpably wrong standard.

The case is simple. A woman with pre-school children may not be employed, a man with pre-school children may.[5] The distinguishing factor seems to be motherhood versus fatherhood. The question then arises: Is this sex-related? To the simple query the answer is just as simple: Nobody — and this includes Judges, Solomonic or life tenured — has yet seen a male mother. A mother, to oversimplify the simplest biology, must then be a woman.

It is the fact of the person being a mother — *i.e.* a woman — not the age of the children, which denies employment opportunity to a woman which is open to a man.

How the Court strayed from that simple proposition is not easy to divine. Not a little of the reason appears to be a feeling that the Court in interpreting §703(a)

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[5]The man would qualify even though as widower or divorcé he had sole custody of and responsibility for pre-school children.

(1), 42 USCA §2000e-2(a) (1), prohibiting sex discrimination,[6] is bound to accept the contention of one of the parties, rather than pick and choose, drawing a middle line, or for that matter reaching independently an interpretation sponsored by no one. Thus, after noting that in the Trial Court and here the Employer did not "choose to rely on the 'bona fide occupational qualification' section of the Act,[7] but, instead, defended on the premise that their established standard of not hiring women with pre-school age children is not per se discrimination on the basis of 'sex'" (*Phillips v. Martin Marietta Corp.*, 5 Cir., 1969, 411 F.2d 1, 2-3),

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[6]Section 703(a) (1) reads as follows:

"(a) It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

42 USCA §2000e-2(a) (1).

[7]Section 703 (e) states:

"(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. * * *"

42 USCA §2000e-2(e).

the Court virtually acknowledges the patent discrimination based on biology. The Court states: "Where an employer, as here, differentiates between men with pre-school age children, on the one hand, and women with pre-school age children, on the other, there is arguably an apparent discrimination founded upon sex. It is possible that the Congressional scheme for the handling of a situation of this kind was to give the employer an opportunity to justify this seeming difference in treatment under the 'bona fide employment disqualification' provision of the statute." 411 F.2d at 4.

But in what immediately followed the Court then does a remarkable thing. Referring to EEOC (appearing only as *amicus*), it states: "The Commission, however, in its appearance before us has rejected this possible reading[8] of the statute. It has left us, if the prohibition is to be given any effect at all in this instance, only with the alternative of a Congressional intent to exclude absolutely any consideration of the differences between the normal relationships of working fathers and working mothers to their pre-school age children, and to require that an employer treat the two exactly alike in the administration of its general hiring policies. If this is the only permissible view of Congressional intention available to us, * * * we have no hesitation in choosing the latter." 411 F.2d at 4.

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[8]Such a reading is certainly not rejected by EEOC on this rehearing. The supplemental brief (pp. 9-10) recognizes the employer's right to claim and prove the §703(e) "business necessity" exemption. (See note 7, *supra*).

It is this self-imposed interpretive straightjacket which, I believe, leads the Court to the extremes of "either/or" outright per se violation with no defense or virtual complete immunity from the Act's prohibitions. This it does through its test of "sex plus": "[1] A per se violation of the Act can only be discrimination based solely on one of the categories *i.e.* in the case of sex; women vis-a-vis men. [2] When *another* criterion of employment *is added* to one of the classifications listed in the Act, there is no longer apparent discrimination based solely on race, color, religion, sex, or national origin."[9] 411 F.2d at 3-4 (Emphasis supplied).

Reducing it to this record the Court characterizes the admitted discrimination in this way. "The discrimination was based on a *two-pronged* qualification, *i.e.*, a woman with pre-school age children. Ida Phillips was not refused employment because she was a woman nor because she had pre-school age children. It is the *coalescence* of these *two elements* that denied her the position she desired. In view of the above, we are convinced that the judgment of the District Court was proper, and we therefore affirm." 411 F.2d at 4 (Emphasis supplied).

If "sex plus" stands, the Act is dead.[10] This follows from the Court's repeated declaration[11] that the em-

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[9]By supplemental brief (p. 4, n. 1) EEOC agrees with [1] on "per se" violations.

[10]Of course the "plus" could not be one of the other statutory categories of race, religion, national origin, etc.

[11]See, *e.g.*, "As was acknowledged in *Cooper, supra*, 42 USC 2000e-2(a) does not prohibit discrimination on any classification except those named within the Act itself. Therefore, once the

ployer is not forbidden to discriminate as to non-statutory factors. Free to add non-sex factors, the rankest sort of discrimination against women can be worked by employers. This could include, for example, all sorts of physical characteristics, such as minimum weight (175 lbs.), minimum shoulder width, minimum biceps measurement, minimum lifting capacity (100 lbs.), and the like. Others could include minimum educational requirements (minimum high school, junior college), intelligence tests, aptitude tests, etc. And it bears repeating that on the Court's reading, one of these would constitute a complete defense to a charge of §703(a)(1) violation *without* putting on the employer the burden of proving "business justification" under §703(e) (note 7, *supra*).

In addition to the intrinsic unsoundness of the "sex plus" standard, the legislative history refutes the idea that Congress for even a moment meant to allow "non-business justified" discrimination against women on the ground that they were mothers or mothers of pre-school children. On the contrary, mothers, working mothers, and working mothers of pre-school children were the specific objectives of governmental solicitude.

In the first place, working mothers constitute a large class[12] posing much discussed problems of economics

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employer has proved that he does not discriminate against the protected groups, he is free thereafter to operate his business as he determines, hiring and dismissing other groups for any reason he desires." 411 F.2d at 4.

[12]Statistics compiled by the Wage and Labor Standards Administration of the United States Department of Labor indicate that working mothers comprise an important and increasing seg-

and sociology. And with this large class and the known practice of using baby-sitters or child care centers, neither an employer nor a reviewing Court can — absent proof of "business justification" (note 7, *supra*) — assume that a mother of pre-school children will, from parental obligations, be an unreliable, unfit employee.[13]

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ment of the Nation's labor resources. In the most recent compilation (March 1967), there were 10.6 million working mothers in the labor force with children under 18 years of age. This is an increase of 6 million over 1950 and an increase of 9.1 million over 1940. Of the total of working mothers in March 1967, 38.9% were mothers of children under 6 years of age and 20.7% were mothers with children under 3 years of age. In numerical terms, 4.1 million working mothers had children under 6 and 2.1 million working mothers had children under 3. *Who are the Working Mothers*, United States Department of Labor, Wage and Labor Standards Administration, p. 2-3 (Leaflet 37, 1968).

[13]The brief of EEOC points out:

"In answering the question: 'What arrangements do working mothers make for child care?', the Department of Labor responded:

> 'In February 1965, 47 percent of the children under 6 years of age were looked after in their own homes and thirty percent were cared for in someone else's home, but only 6 percent received group care in day care centers or similar facilities.'
> *Who are Working Mothers, supra* [Note 12]."

Furthermore, it is the policy of the Administration to encourage unemployed women on public assistance, who have children, to enter the labor market by providing for the establishment of day care centers to enable them to accept offers of employment. On August 8, 1969, President Nixon stated in his address to the Nation on welfare reforms:

> 'As I mentioned previously, greatly expanded day-care center facilities would be provided for the children of welfare mothers who choose to work. However, these would be day-care centers with a difference. There is no single ideal to which this Administration is more firmly committed than to the enriching of a child's first five years of life, and, thus helping

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In this and the related legislation on equality of *compensation* for women[14] one of the reasons repeatedly stressed for legislation forbidding sex discrimination was the large proportion of married women and mothers in the working force whose earnings are essential to the economic needs of their families.'[15]

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lift the poor out of misery, at a time when a lift can help the most. Therefore, these day-care centers would offer more than custodial care; they would also be devoted to the development of vigorous young minds and bodies. As a further dividend, the day-care centers would offer employment to many welfare mothers themselves.' *Text of Nixon's Address to the Nation Outlining His Proposals for Welfare Reform*, N. Y. Times, August 9, 1969, at 10, Col. 6."

Brief for EEOC at 11-12.

[14]Equal Pay Act of 1963, 77 Stat. 56, effective June 11, 1964, 29 USCA §206. See pending cases, note 2 *supra*.

[15]Thus, President Kennedy, in signing the Equal Pay Act, summarized the conditions which necessitated such a law, as follows:

"[T]he average women worker earns only 60 percent of the average wage for men * * *. Our economy today depends upon women in the labor force. One out of three workers is a woman. Today, there are almost 25 million women employed, and their number is rising faster than the number of men in the labor force. It is extremely important that adequate provision be made for reasonable levels of income to them, for the care of the children * * * and for the protection of the family unit * * * Today one out of five of these working mothers has children under three. Two out of five have children of school age. Among the remainder, about 50 percent have husbands who earn less than $5,000 a year — many of them much less. I believe they bear the heaviest burden of any group in our nation. * * *" [Remarks of the President at signing the Equal Pay Act on June 10, 1963, XXI Cong. Q. No. 24, p. 978 (June 14, 1963).]

At the Senate Hearings, Secretary of Labor Wirtz pointed out:

"Women's earnings, in many families, are a substantial factor in meeting living costs. *Married women*, for

Congress could hardly have been so incongruous as to legislate sex equality in employment by a statutory structure enabling the employer to deny employment to those who need the work most through the simple expedient of adding to sex a non-statutory factor.[16]

A mother is still a woman. And if she is denied work outright because she is a mother, it is because she is a woman. Congress said that could no longer be done.

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example, *accounted for over one-half of the total number of women workers in 1962.* Nearly 900,000 working women had husbands who, for various reasons, were not in the labor force, primarily because they were disabled or retired. The proportion of working wives is materially higher among families in the low-income groups." [1963 Senate Hearings, p. 16]

See also Representatives Green (109 Cong. Rec. 9199):

"There are approximately 25 million working women in the labor force today, and we are simply asking, by this legislation, to look at the facts as they face us in 1963, in instances where there is unequal pay. * * * Women are the heads of 4.6 million families in the United States; one-tenth of all the families in this country. Nearly one million working women have husbands who are not employed, mainly because they are disabled or retired. Nearly 6 million working women are single. The proportion of married women who work is materially higher in the low-income families, and, according to the testimony that was presented to the committee, some 7.5 million women workers supplement the income of male wage earners who make less than $3,000 a year. Women's wages average less than two-thirds of the wages paid men."

[16]Too much emphasis cannot be given to the employer's right to claim and prove the §703(e) "business justification" exemption (see note 7, *supra*). This was not done, but on remand it should be open to the employer here.

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Clerk's Certificate

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 26825

IDA PHILLIPS,

Plaintiff-Appellant,

versus

MARTIN MARIETTA CORPORATION,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

I, Edward W. Wadsworth, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing page contain a full, true and complete copy of the following papers: Original Record on Appeal, Argument and Submission, Opinion of the Court, Judgment, Letter recalling mandate pending further order of the Court, and Opinion-Order Denying Petition for Rehearing and Petition for Rehearing En Banc; in the above cause in this Court as full, true and complete as the originals of the same now remain in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Court of Appeals

Clerk's Certificate

at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this date.

EDWARD W. WADSWORTH
Clerk of the United States Court of Appeals for the Fifth Circuit.

Date: December 17, 1969.

By Signature Illegible
Deputy Clerk

Order Allowing Certiorari—March 2, 1970

SUPREME COURT OF THE UNITED STATES

No. 1058—October Term, 1969

IDA PHILLIPS,

Petitioner,

vs.

MARTIN MARIETTA CORPORATION,

Respondent.

The petition for a writ of certiorari is granted and the case is placed on the summary calendar.